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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 261

CARL MICHAEL MIRABILE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

CARL MICHAEL MIRABILE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carl Michael Mirabile prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered April 14, 1964, affirming a judgment of conviction and sentence of the United States District Court for the Southern District of Texas.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are reported as *Mirabile v. United States,* 330 F.2d 676 (1964). They are printed as Appendix A hereto.

JURISDICTION

On April 14, 1964, after deliberating for more than six months after oral argument, the Court of Appeals for the

Fifth Circuit, over the dissent of Circuit Judge John R. Brown, affirmed the conviction of Petitioner of conspiracy to import marihuana in violation of 21 U.S.C.A., Sec. 176a. A timely filed petition for rehearing was denied on May 11, 1964, and on June 4, 1964, Mr. Justice Black entered an order granting an extension of time within which to petition for certiorari to and including July 10, 1964.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner was deprived of his constitutional right to a trial by an impartial jury or was otherwise prejudiced when the District Judge, at the request of a disappointed prosecutor, shortly before the trial of this case, in front of the entire panel of jurors, summoned to his chambers four jurors who had recently acquitted a defendant for the obvious purpose of inquiring into the deliberations which had resulted in the acquittal.

2. Whether the majority of the court below departed from prior decisions of this Court and of the Courts of Appeals in affirming the conviction of the Petitioner, where the prosecutor, in an admittedly close case, persisted in calculated misconduct consisting: a) of improper cross-examination and argument which suggested, without evidence, that the Petitioner was a panderer and was otherwise so unsavory and contemptible that he was capable of committing the crimes alleged, and b) of repeated suggestions that the Petitioner was guilty of alleged prejudicial conduct not in evidence and about which the prosecutor had no intention of offering evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States and the statute codified in 21 U.S.C.A., Section 176a, and they are set forth as Appendix B hereto.

STATEMENT OF THE CASE

Carl Michael Mirabile, who is the Petitioner herein, and a co-defendant named Nicholas Borozzi were charged in a three count indictment returned by the Grand Jury for the Southern District of Texas, with a) conspiring, in the Southern District of Texas, to smuggle marihuana into the United States, in violation of 21 U.S.C.A., Sec. 176a; b) smuggling marihuana into the United States, in violation of 21 U.S.C.A., Sec. 176a; and c) transporting marihuana into the Southern District of Texas without paying the transfer tax imposed by the Internal Revenue Code, in violation of 26 U.S.C.A., Sec. 4744(a)(2).

The case was assigned for trial at a short term of Court which began on September 10, 1962 in Laredo, Texas. The jury panel selected for service during that term consisted of only forty-seven persons, most of whom were residents of the small city of Laredo. All of the cases were tried by the same District Judge. On Friday, September 14, 1962, the entire panel was assembled in Court for the selection of the first jury to serve in that term (R. 8). Twelve jurors were selected for a criminal narcotics prosecution, and, after a brief trial, the case was submitted to the jury that afternoon. The Defendant was acquitted after the jury had deliberated for only eleven minutes (R. 11). On the ensuing Monday, September 17, 1962, the first working day after the unusually swift acquittal, the

entire panel was once again assembled, this time for the selection of a jury for a second narcotics prosecution. The jurors who had acquitted the defendant in the first case were not among those selected for the second trial, and, at the request of the United States Attorney, after the jury for the second trial was selected, while the entire panel was still in the courtroom, the District Judge singled out by name the first four of the twelve jurors who had just recently voted for an acquittal, calling them to his chambers (R. 14, 15).

In the context in which the four jurors were publicly summoned for a conference, it was evident to counsel for the Petitioner, who was present in the courtroom at the time, that they were being called to discuss and explain the deliberations which had resulted in the acquittal, and, perceiving no reason why it should not have been equally apparent to the jury panel, all of whose members were also present, the Petitioner filed a motion to quash and disqualify the panel (R. 7-12).

At the hearing held on the motion it was proven that the jurors had, in point of fact, been called to the Judge's chambers for an explanation of the acquittal. The Judge told them that it had occurred to him that the jury had returned a verdict rather hastily, and he asked if the jurors, in their deliberations, had given the case thorough consideration (R. 21). He also asked the jurors if they had any reason to believe that any juror might have received any outside influence or if they knew of anything improper which might have gone on in the jury room (R. 22). The four jurors, when questioned at the hearing, said that they had not revealed their conversation with the District Judge to the other jurors, and the Judge offered to ask the panel "If they received any communication

from the four as to the fact that the Court gave the four of them any instructions as to handle any future case, or anything of the sort, that might react adversely'' (R. 20). Counsel for the Petitioner replied, however, that a voir dire examination of that sort would, itself, be prejudicial and would only remind the panel once more that four of their members had been singled out and called into chambers after returning a verdict of not guilty, and the offer was, therefore, declined (R. 20, 21). The motion was denied (R. 17).

The four jurors were removed from the panel available for the Petitioner's case. The practice in the District Court was to assign a permanent number to each member of the panel, and, when assembled for jury selection, they were seated in order. When the panel was assembled for the trial of the Petitioner's case, the four spaces previously occupied by the jurors who had been called to the Judge's chambers were vacant (R. 25).

The Petitioner's trial began on the afternoon of September 23rd and it was concluded before the end of the next day. The co-defendant, Borozzi, entered a guilty plea to the alleged revenue violation shortly before the trial, and the Petitioner was tried alone. At the conclusion of the case, the District Judge remarked that the evidence had shown ''rather conclusively that it was Borozzi and not Mirabile who did the actual smuggling,'' and only the conspiracy count was submitted to the jury for its consideration (R. 173). The Petitioner was convicted of this charge, and, thereafter, he was sentenced to a five-year term of imprisonment.

Even on the conspiracy charge the case was a close one. It was agreed that in the first days of April, 1962, the

Petitioner and Borozzi took a trip from Baltimore, Maryland to Mexico, and that, on the evening of April 10th, Borozzi alone was arrested after he crossed the Rio Grande near Laredo, Texas, with a suitcase full of marihuana. The Petitioner did not dispute the fact that he had been with Borozzi. He maintained that he went to Mexico for various pleasures (R. 104-105, 122-123, 132); that he did not discover that Borozzi was engaged in a criminal enterprise until he was in Mexico with him (R. 112-114); that he balked at smuggling the marihuana which Borozzi had purchased (R. 115); that he abandoned Borozzi in Nuevo Laredo, Mexico on the morning before Borozzi smuggled it (R. 115); and that, at the time that he entered the United States, he was not associated with Borozzi's venture (R. 116).

Borozzi was not called as a witness for the prosecution. The principal Government witness was a man named Hector Rodriguez, Borozzi's self-confessed accomplice, a man who, for some unexplained reason, was never prosecuted. Through him the Government introduced the only direct evidence linking the Petitioner to the alleged conspiracy (R. 25-61). The Petitioner testified in his own defense and he denied participation in the smuggling or in the conspiracy (R. 104, 137). Essentially, the trial was a test of the relative credibility of these two witnesses.

The cross-examination of the defendant was marked by unjustified insinuations and accusations, some of which were wholly irrelevant to the charge and none of which were followed by any evidence. The prosecutor repeatedly suggested that facts prejudicial to the Petitioner but not in evidence were known to the Government, among which were the following: that the Petitioner was a panderer

(R. 120-122); that the Petitioner, even at the time of trial, was guilty of immoral conduct and was sharing his hotel room with a girl named Jacqueline Gay (R. 132); that the Petitioner, and not Borozzi, initiated the smuggling scheme and planned it (R. 124-125); that the Petitioner knew narcotics traffickers in Mexico (R. 124-125); and that the Petitioner's friendship in Baltimore with a man of apparent Spanish extraction named Hernandez assumed some sinister significance in this case (R. 124-125). At the conclusion of all the evidence, and prior to argument, counsel for the Petitioner protested to the District Judge that the prosecutor was attempting "to bring in all sorts of misconduct not a part of this indictment," but the Judge declined to act (R. 138, Tr. 192). The prosecutor, unrestrained, continued to employ the same tactics, and, in his final argument when Petitioner had no opportunity to reply, in answer to the argument of the defense that the Government had failed to show that the Petitioner had an available market for the large amount of marihuana in the case, he declared, without evidence, that the Petitioner was "working" a prostitute and that, therefore, "he could certainly get rid of it" (R. 166). An objection to the argument was sustained without comment or admonition, and the Petitioner then moved for a mistrial (R. 166). The motion was promptly overruled, and the prosecutor then abandoned the record altogether and expressed his personal belief that the Petitioner had a ready market for marihuana in Baltimore (R. 166-167). Some time later, toward the end of his charge, the District Judge repeated the prejudicial comments, erroneously telling the jury that there had been "testimony" in the record which suggested that the Petitioner was living in part off the earnings of a prostitute, and he simply "asked" the jurors not to consider it (R. 181).

The conviction was affirmed by a divided panel. The majority of the panel, while voting to affirm the conviction, recognized that the evidence against the defendant was not overwhelming and that "in the main the government's case rested on the testimony of Hector Robles Rodriguez, a citizen of Monterrey, Mexico, who acted as a go-between in the sale of marihuana to Borozzi." (App. 2) They declared moreover, that "this case was prosecuted with a zeal which approached bounds of impropriety" and that they "do not condone the type of tactics here engaged in by the prosecutor, with their tendency to lead to error." (App. 3) Because of the belated and highly questionable admonition by District Judge, however, the majority, over the dissent of Judge Brown, found no reversible error. Judge Brown, on the other hand, viewing the record in its entirety, expressed the view that "the improper examination of the defendant coupled with the inflammatory remarks made by the prosecutor in argument constitute prejudicial error," and he felt compelled to conclude that the case was one "in which the only one hurt gets no relief". (App. 4, 5).

REASONS FOR GRANTING THE WRIT

1. "A juror," the Court said in *Remmer v. United States*, 347 U.S. 227, 229 (1954), "must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder." As Professor Wigmore observed, moreover, jurors' "communications originate in a confidence of secrecy" and "this confidence is essential to the due attainment of the jury's constitutional purpose." VIII Wigmore, Evidence (McNaughton Rev., 1961), Sec. 2346, p. 678. See also: *Gold v. United States*, 352 U.S. 985 (1957); *Brasfield v. United States*, 272 U.S. 448 (1926). Even where there is suspected wrongdoing on the jury, the mere charge

of impropriety is insufficient to permit the Judge to inquire into its deliberations, for, as Mr. Justice Cardozo said, "Freedom of debate may be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world . . . There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in." *Clark v. United States,* 289 U.S. 1, 13-14 (1933).

Jurors observe the actions of the District Judge with keen perception, and, as the Court noted in *Starr v. United States,* 153 U.S. 614, 626 (1894), his "lightest word is received with deference and may prove controlling." Mindful of the lesson of *Starr,* Chief Judge Steckler of the Southern District of Indiana, in discussing the manner in which a Judge, if the necessity arises, should confer with jurors, has cautioned that they should be "privately notified" after the others have been "discreetly excused" and that "Great care should be exercised to avoid arousing the curiosity of the other jurors . . ." Steckler, *Managing the Jury,* 29 F.R.D. 190, 194. The public summons to the Judge's chambers of the first four members of a jury that had just voted for an acquittal could not, as suggested by the court below, have gone unnoticed, for nothing could have aroused the curiosity of the panel more. Cf. *McLendon v. United States,* 2 F.2d 660 (6 Cir., 1924).

Without approving or disapproving of the District Judge's act, the court below held only that no prejudice resulted from it, relying heavily upon the Petitioner's rejection of the Judge's offer to question the entire panel about his conversation with the four jurors. This holding is in direct conflict with that of the Sixth Circuit in *Boyles v. United States,* 295 F. 126 (6th Cir., 1924). In the *Boyles* case, the defendant challenged the entire panel after the

Judge, in a prior case, discharged a juror named Mahannah who had voted to acquit him. The Government argued to the Court of Appeals that the record showed "no voir dire examination of the jurors on the second trial with respect to their knowledge of the Mahannah incident and its effect upon them," but the Court replied that "a voir dire examination of the nature suggested would not improbably be of itself more or less prejudicial." The harm produced by judicial interference, *Boyles* teaches, cannot be removed by a further reminder that it had occurred.

The opinion of the court below suggests, moreover, that it was the burden of the Petitioner to prove that an actual, definable prejudice resulted from the judge's act. Once there has been interference with the jury, however, such error is reversible ". . . if within the range of reasonable possibility it may have affected the verdict, [and] the accused does not have the burden of showing an adverse effect." *Bacino v. United States,* 316 F.2d 11, 14 (10 Cir., 1963). Cf. *Remmer v. United States,* 347 U.S. 227 (1954); *Rice v. United States,* 149 F.2d 601 (10 Cir., 1945); *Holmes v. United States,* 284 F.2d 716 (4 Cir., 1960).

2. The majority of the court below has ignored the holdings in similar cases, in the Fifth Circuit and elsewhere, that irrelevant suggestions of immoral conduct are highly prejudicial and cast doubt upon the ability of the accused to secure a fair trial. In *Brown v. United States,* 202 F.2d 474 (5 Cir., 1953), where a police officer, while testifying in a marihuana tax case, volunteered that he had arrested the defendant's wife at different hotels, the Court of Appeals held that the remark was "highly prejudicial" and that, in the new trial which was awarded to the defendant, "the incident should not be repeated." The

incident was repeated in the trial of the present case, this time with success. Similarly, in *Ingram v. United States,* 106 F.2 683, 684 (9 Cir., 1939), where the defendant was prosecuted for illegal possession of morphine and the principal witness on his behalf was his wife, and where the prosecutor cross-examined her "as to claimed improprieties in her conduct, inconsistent with that of a continued marital relationship," the Court in reversing the conviction declared: "It is obvious that the main purpose of entering into this inquiry, irrelevant to the direct examination, was to degrade her in the minds of the jury. The prejudicial effect of the questions is obvious." See also: *United States v. Lefkowitz,* 284 F.2d 310, 314 (2 Cir., 1960); *La Feber v. United States,* 59 F.2d 588, 590 (8 Cir., 1932); *United States v. Cohen,* 177 F.2d 523 (2 Cir., 1949).

3. The majority of the court below, in declining to infer that prejudice resulted from the misconduct of the prosecutor, has refused to follow the recent holding of another panel in the same Circuit in *Dunn v. United States,* 307 F.2d 883 (5 Cir., 1962). Dunn, the mayor of Baxley, Georgia, was charged with income tax evasion. The Government's theory was that the defendant failed to report income received in the form of kickbacks from suppliers who performed work and furnished goods to that city. The prosecutor's misconduct consisted of a comment, in his opening statement, that the case was replete with fraud and an insinuation, in his final argument, that because the defendant was a politician he must have taken the alleged kickbacks. The defendant's attorney objected to the insinuation and moved for a mistrial. The motion was denied and the Judge promptly admonished the jury to "disabuse your minds of that". On appeal, the Fifth Circuit reversed the conviction, holding that the remark was

prejudicial, that a mistrial should have been declared, and that the Judge's admonition could not have cured the error.

Noting the difficulty of undoing the effect of such prejudicial misconduct by an instruction to disregard, the Court, in *Dunn*, said: "Otherwise stated, 'one cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound': and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'." 307 F.2d 883, 886. Cf. *Jackson v. Denno, Warden,* ..... U.S. ....., 32 LW 4620, 4626, n. 15 (June 22, 1964), where Mr. Justice White, for the Court, quoted with approval the comment of Mr. Justice Frankfurter, in his dissent in *Delli Paoli v. United States,* 352 U.S. 232, 248 (1957), that "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds," as well as Mr. Justice Jackson's observation that the "naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (concurring opinion).

In the instant case, the misconduct was more pronounced and persistent than that found in *Dunn.* In *Dunn,* moreover, it was conceded that the defendant was a politician and the jury was only asked to draw one impermissible inference, i.e., that politicians take kickbacks. In the present case, the jury was told to take the prosecutor's word that the defendant was a panderer, and, once having agreed with that unproven assertion, to accept the argument that all panderers have a market for marihuana. Cf. *Handford v. United States,* 249 F.2d 295 (5 Cir., 1957).

4. The majority of the court below has failed to follow *Berger v. United States*, 295 U.S. 78 (1935). In a factual context strikingly similar to that presented here, Mr. Justice Sutherland, in *Berger*, speaking for the Court, declared:

> "The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.
>
> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." 295 U.S. 78, 88-89.

The bounds of propriety, the *Berger* case teaches, are clearly exceeded when a prosecutor, in the conduct of a cross-examination, is guilty "of misstating the facts" and "of assuming prejudicial facts not in evidence". *id.* p. 84. His argument to the jury, moreover, may not contain "improper insinuations and assertions calculated to mislead the jury." *id.* p. 85. Jurors have confidence in the prosecutor's observance of his duty of fairness to the accused, and, "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *id.* p. 88. Where the evidence of guilt is not "overwhelming" and the misconduct is "persistent," *Berger* holds, the prejudicial effect cannot be removed by "mild judicial action".

5. The majority of the court below has rejected the rule announced in *Salerno v. United States*, 61 F.2d 419, 424

(8 Cir., 1932), that "When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the Government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have." The holding of the majority below is likewise contrary to *United States v. Pennix,* 313 F.2d 524, 531 (4 Cir., 1963). The Government urged the Court of Appeals for the Fourth Circuit to embrace the view of the majority below, but the Court there declared:

> "The Government insists that, even admitting that the cross-examination of the defendant was improper, it was not so prejudicial to the defendant as to constitute prejudicial error. But it is clear that here the primary issue for jury determination was the conflict between the testimony of Pennix, on the one hand, and that of the two self-confessed bank robbers, on the other. Thus, the credibility of witnesses was sharply brought into focus and any error which reflected upon or tended to impeach the credibility of the defendant may not be said to be insubstantial."

6. The opinion of the majority below is in error in its recitation of essential facts and fails to consider other facts which demonstrate the aggravated nature of the prosecutor's conduct:

a) The majority opinion states that the improper cross-examination was conducted without objection. This statement is in error. When the prosecutor began to question the defendant with respect to the woman who was said to be a prostitute, the inquiry drew objection. Counsel for the defendant pointed to the irrelevancy of the inquiry and, going further, asked for a conference at the bench. His

protests were ignored, however, and the District Judge instructed the prosecutor to "go forward". The following is an excerpt from pages 120 and 121 of the record:

"Q. When was the last time you worked as a bartender? A. That's what I am doing now.

Q. But prior to the time that you came down here with Borozzi? A. I was working in a bar, as a bartender.

Q. How many hours a day did you work there? A. About ten hours a day, I guess.

Q. Did you have any other means of income? A. None.

Q. You had no other income besides that that you made as a salary as being a bartender, is that right? A. That's right.

Q. Do you know a woman by the name of Sarah Shapiro? A. Yes, I do.

Q. Do you know her name also as Sally O'Malley? A. Right.

(Mr. Weiner) Objection. I don't know what they are aiming at.

(The Court) I don't either.

(Mr. Weiner) It might be something that—I would like to have a conference at the bench, if your Honor please. There might be something there; I don't know what they are going to bring out.

(Mr. Cook) Your Honor, the Defendant has stated he had no other means of income. We intend to show he does have other means of income.

(Mr. Weiner) Well, first they ask him, then they want to rebut something that they themselves are raising.

(The Court) You may go forward.

Q. What—you say you do know her? A. Yes, I do.

Q. You know her by which name? A. Well, Sarah Shapiro.

Q. Do you also know her by Sally O'Malley? A. Sally O'Malley?

Q. What is her occupation? A. She is a barmaid at the Villanova Night Club.

Q. She is also a prostitute, is she not? A. I don't know.

Q. You don't know; you have never received any money from her?"

The record clearly demonstrates that objection to the line of inquiry was made in a diligent manner. The majority of the panel below, however, has either overlooked this aspect of the record or has decided, without voicing it, that it was the duty of the Petitioner's counsel to repeat his objection to each and every question asked on this subject. If the latter is true, the court below has applied a rule of evidence which is in general disrepute and which, as Professor McCormick has said, is "a practice which places . . . [the lawyer] . . . in the invidious semblance of a contemptuous obstructor, and conduces to waste of time and fraying of patience. Most courts hold that . . . [the lawyer] . . . is entitled to assume that the judge will continue to make the same ruling and that he need not continue the objection." McCormick, Evidence (1954), Ch. 6, Sec. 52, p. 120. See also: *Union Electric Light and Power Co. v. Snyder Estate Co.*, 65 F.2d 297 (8 Cir., 1933); *Tucker v. Reil*, 77 P.2d 203, 208 (Ariz., 1938); *Wilcox v. Sway*, 160 P.2d 154 (Cal., 1945); *Selz-Schwab & Co. v. Industrial Commission*, 156 N.E. 763 (Ill., 1927); *State v. Monninger*, 182 N.E.2d 426 (Ind., 1962); *Gardner's Adm'r v. Dale*, 219 S.W.2d 40 (Ky., 1949); *Shaneybrook v. Blizzard*, 121

A.2d 218 (Md., 1956); *Cook v. Kansas City*, 214 S.W.2d 430, 434 (Mo., 1948); *Bennett v. Gusdorf*, 53 P.2d 91 (Mont., 1936); *In re House's Estate*, 18 N.W.2d 500 (Neb., 1945); *Brady v. Stafford*, 152 N.E. 188 (Ohio, 1926); *Citizens Bank of Nevada v. Robison*, 323 P.2d 705 (Nev., 1958); *Webber v. Yaden*, 373 P.2d 1007 (Ore., 1962); *Crispi v. Emmott*, 337 S.W.2d 314 (Texas, 1960).

The majority of the court below, moreover, gives no weight to the affirmative duty of the trial judge to prevent such conduct as occurred here. As the Court held in *Viereck v. United States*, 318 U.S. 236, 248 (1943), where the prosecutor engaged in conduct which was "offensive to the dignity and good order with which all proceedings in court should be conducted," the "trial judge should have stopped counsel's discourse without waiting for an objection." Cf. *N. Y. Central R.R. Co. v. Johnson*, 279 U.S. 310, 318 (1926), where Mr. (later Chief) Justice Stone, on behalf of the Court, remarked that "a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy of no importance to the public'. The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

b) The majority of the court below has failed to acknowledge that when the prosecutor in the present case posed the series of suggestive questions on cross-examination which went to the very heart of the case and implied

that there had been conversations in Baltimore in which the Petitioner initiated the smuggling scheme, defense counsel had neither the obligation nor the right to object. Such assertions on cross-examination, Professor Wigmore has said, are proper if evidence of such facts is later to be produced by the cross-examiner. By undertaking the inquiry, the prosecutor impliedly represented to the court that "evidence about it . . . is pledged for future consideration." VI Wigmore, Evidence (3rd Ed.), Sec. 1807, p. 263, and Sec. 1808, p. 274. Cf. Canon 22, Canons of Professional Ethics. Defense counsel had the right to anticipate that such questions would be followed by evidence which would be subject to his cross-examination and upon which the jury could fairly pass. As the case developed, however, the Petitioner, on a highly relevant subject, was contradicted only by an unsworn and unseen witness.

c) The majority opinion below conveys the impression that the improper argument was due, in part at least, to the failure of counsel for the defendant to call upon the Judge, early in the trial, to impose restraint upon the prosecutor. The record, however, shows that this was not the case. Before the lawyers argued to the jury, a conference was held with the Judge in his chambers. Counsel for the Petitioner, at that time, complained about the misconduct of the prosecutor, saying: "Your Honor, they are trying to show the fellow is living with people in hotel rooms, and has a girlfriend named Sally O'Malley and I think that prosecution attempted to bring in all sorts of misconduct not a part of this indictment" (R. 138). Counsel for the Petitioner asked the Judge to admonish the Jury, but he declined to act at that time, saying only that he would think about the matter "a little bit" (Tr. 192). The improper argument occurred shortly thereafter.

d) The majority opinion below neglects to mention that

even the motion for mistrial failed to inhibit the prosecutor. After the Judge sustained the objection to the argument that the Petitioner was a panderer and therefore had a ready market for marihuana, the prosecutor abandoned the record altogether, and, expressing his personal opinion of the defendant's guilt, exclaimed: "'He had a ready market for it, *I'm quite certain of that,* he and Nicholas Borozzi both" (R. 166-167) (Emphasis supplied).

e) The majority opinion below fails to consider that the statement which the District Judge ultimately made, long after the argument, was itself in error. The Judge referred to the prosecutor's unsupported suggestion as if it were evidence in the case and, instead of firmly instructing the jury to disregard it, he simply requested them to do so. He said:

> "There has been *testimony* referred to in the argument by the Government's counsel which suggests that he perhaps was living in part at least off the earnings of a prostitute. He is not charged with *that offense.* It is an irrelevant matter which apparently crept in when I was unaware as to what was coming. I will *ask* you not to consider that *testimony* as to any circumstance for any purpose" (R. 181) (Emphasis supplied).

So often and forceful were the prosecutor's unsupported and unwarranted suggestions that even the District Judge was led to believe that there had been evidence of them. The jury could not have been expected to be more discriminating.

7. The Fifth Circuit, in *Fogarty v. United States,* 263 F.2d 201 (5 Cir., 1959), held that if misconduct in the course of argument can be cured at all, it must be by corrective action taken immediately upon the voicing of objection to the offensive remark, and that, therefore, a

motion for mistrial which is made at the conclusion of argument is too late. The District Judge in this case took no steps to exclude the objectionable remarks during the course of argument, although timely objection was made. Instead, he permitted them to be digested by the jurors and waited until the end of his charge before mentioning them. The majority of the panel in the present case disregards the prior holding of the same Court in *Fogarty*, and, by clear implication, holds that the Judge had no duty to act promptly and that the prejudicial effect of misconduct can be cured by any admonition. In doing so, the majority of the court below also repudiates the principle, discussed in *United States v. Bugros*, 304 F.2d 177 (2 Cir., 1962), that an attempt at curing improper comment by repeating it in the course of an admonition merely serves to aggravate its effect.

8. The majority of the court below fails to give effect to what the Court of Appeals for the Second Circuit recently described as, "one of the most fundamental notions known to our law—that a man is entitled to be tried only for specific charges explicitly stated, and should not be compelled to defend a lifetime of conduct." *United States v. Beno*, 324 F.2d 582, 587 (2 Cir., 1963). The defendant in this case was asked to defend himself against repeated charges of various acts of alleged misconduct, but his conviction was nevertheless affirmed.

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20168

Carl Michael Mirabile,
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(April 14, 1964.)

Before HUTCHESON and BROWN, Circuit Judges, and SIMPSON, District Judge.

HUTCHESON, Circuit Judge: Carl Michael Mirabile is here appealing from the judgment and sentence of the United States District Court for the Southern District of Texas, on his conviction of conspiracy to import marihuana, in violation of 21 U.S.C.A. Sec. 176a[1], for which he received a five year sentence.

[1] 21 U.S.C.A. Sec. 176a. "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Mirabile and Nicholas Borozzi were indicted in three counts for conspiring to smuggle marihuana, smuggling, and violating the revenue laws concerning marihuana transfers. Borozzi pleaded guilty to the revenue law violations, and Mirabile was tried alone. Only the conspiracy count was submitted to the jury. In the main the government's case rested on the testimony of Hector Robles Rodriquez, a citizen of Monterrey, Mexico, who acted as a go-between in the sale of marihuana to Borozzi.

The appellant does not, nor can he, assert that the evidence given by Rodriguez, bolstered as it was by that of other government witnesses, was insufficient. Instead he argues that the nature of the prosecutor's cross-examination of the defendant, coupled with that of his jury argument, was prejudicial and reversible error. He further asserts that the district court erred in failing to grant his motion to quash and disqualify the jury panel from which his jury was selected.

During the course of cross-examining the defendant, the prosecutor, attempting to determine the sources of Mirabile's income, asked if Sally O'Mally, a woman he knew as a bar maid, was also a prostitute. He answered, "I don't know". In connection with a series of questions designed to determine whether Mirabile had knowledge of sources of supply in Mexico and had planned the buying trip, Mirabile was asked the last name of a Baltimore friend. He answered, "Hernandez." These two questions to which the defendant now objects were not objected to during the course of the trial. Finally, while questioning the defendant, the prosecutor attempted to determine whether the defendant and his girl friend were sharing a room during the trial. This question was objected to, with the district judge commenting on its irrelevancy. It went unanswered. In closing argument, the prosecutor, in answer to the argument of the defense that the government had failed to show that Mirabile had a market for the large amount of marihuana involved in the case, argued that if the defendant was working Sally O'Mally, he would

have a market. This argument was objected to, the objection was sustained, a simultaneous motion for mistrial was overruled, and in the court's charge to the jury, instructions were given to disregard this as irrelevent.

This case was prosecuted with a zeal which approached bounds of impropriety, and we do not condone the type of tactics here engaged in by the prosecutor, with their tendency to lead to error. However, we find no reversible error. What error there was, if any, in the question and argument objected to was removed by the action of the trial judge, and, likewise, whatever error there might have been in the questions which passed without objection did not affect the substantial rights of the accused. Fed. Rules of Civil Procedure 52.

Seven days before defendant's trial, on September 17, 1962, the petit jury panel for the September term was excused for several days. In that panel's presence four of its members were requested by the district judge to meet with him that afternoon at 1:15. In his chambers the district judge asked these four jurors, who had three days before served on a jury which had acquitted a defendant charged with violation of the narcotics laws in eleven minutes, whether they had given the verdict in that case thorough consideration, whether any juror might have received outside influence, whether anything improper had gone on, and he told them that they had returned a verdict rather hastily. The defendant, upon learning this prior to his trial, moved to quash the September term panel, from which his jury was to be chosen. He is here contending that the public summons to these four jurors was a "demonstration to the entire panel that a vote for acquittal could result in a conference in the judge's chambers, and that a juror who voted for acquittal might expect to be called upon to explain his vote to someone outside the jury".

A hearing was held on this motion outside of the presence of the September term panel, in which the district judge removed the four jurors from the term panel available

for Mirabile's case. He also offered to examine or allow the defense to examine the remainder of the panel on the effect of the summons of the four to the judge's office. These offers were rejected. The four jurors were collectively examined by the defense during the hearing and testified that they had neither told nor been asked about their meeting with the judge.

In light of the precautions taken to insure that no prejudice resulted from the judge's actions, we hold that his summons to the four, made as it was in front of the entire panel, did not constitute error. Nor is there any indication of harm resulting from the absence of the four from the panel as it was assembled for jury selection in the Mirabile trial. We cannot infer that the members of the panel considered that the summons to the judge's office and the subsequent absence of the four from the panel were the result of criticism of the four jurors, and then infer that the panel was infected by this implied criticism of unknown nature in such a way as to be disqualified to serve on the defendant's jury.

The claim of error here is farfetched, indeed, frivolous. There being no substance in any of appellant's claims of error, the judgment is AFFIRMED.

BROWN, Circuit Judge, dissenting:

Because I believe that the improper examination of the defendant coupled with the inflammatory remarks made by the prosecutor in argument constitute prejudicial error requiring reversal, *Dugan Drug Stores, Inc. v. United States*, 5 Cir., 1964, 326 F.2d 835; *Hull v. United States*, 5 Cir., 1963, 324 F.2d 817; *Washington v. United States*, 5 Cir., 1964, ... F.2d ..... [No. 20415, February 17, 1964], I respectfully dissent. *United States v. Cohen*, 2 Cir., 1949, 177 F.2d 523, 528 (dissenting opinion). The Court recognizes that the questions, to the certain professional knowledge of the prosecutor, were improper. All of this was compounded by the equally impermissible argument which drilled in the prior inadmissible testimony. The case seems

to be another in which the only one hurt gets no relief. *Cf. Tipton v. Socony Mobil Oil Co.*, 5 Cir., 1963, 315 F.2d 660, 662 (dissenting opinion), reversed mem., 1963, ... U.S. ....., ... S.Ct. ....., 11 L.Ed.2d 4.

APPENDIX B

Amendment 6, Constitution of the United States of America:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C.A., Section 176a:

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.